contrary, it was clear that the defendants would be in a position to pay the damages, if any, awarded in favour of the plaintiff.

24 *Halsbury's Laws of England*, 4th Ed, at para 956 states the following:

> Where any doubt exists as to the plaintiff's right ... in determining whether an interlocutory injunction should be granted, the court takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer if it is granted lies on the plaintiff.

On the facts of this case, to say that there were doubts as to the plaintiff's rights over the structures was to manifestly overstate the plaintiff's case. Be that as it may, applying the principles just quoted, I was of the view that the balance of convenience was clearly in favour of the defendants who were developers. Any unnecessary injunction would cause delay in the development of the said land. The injury which the defendants would suffer would be immense and difficult to assess.

Order accordingly.

Solicitors: *BT Tan & Co*; *Leo Fernando*.

Reported by *Ng Sheau Jiuan*

Bank of China v The First National Bank of Boston

HIGH COURT (SINGAPORE) – ORIGINATING SUMMONS NO 429 OF 1986
LAI KEW CHAI J
18 AUGUST 1988

Land Law – Property mortgaged to plaintiff – Lapse of caveat lodged by plaintiff – Judgment for defendant against owner of property – Defendant obtained charging order against property – Defendant lodged caveat prior to fresh caveat of plaintiff – Competing claims over property – Whether charging order is not a caveatable 'interest in land' – Land Titles Act (Cap 157, 1985 Ed), ss 59(2), 104(4) & 114

Both parties are bankers and each claims that it has a prior claim over a piece of freehold property known as No 28, Coldstream Avenue, Singapore ('the property'). In April 1980, the plaintiff granted overdraft facilities to both Gojo Hartono and Anitawati Sustanto upon the equitable mortgages of the property, two shop units and another landed property. The equitable mortgage of the property in favour of the plaintiff was created by the agreement of Gojo Hartono who signed a confirmation of deposit of title deeds dated 24 April 1980. A caveat bearing No CV/38908 was lodged by the plaintiff which lapsed on 3 July 1985. The plaintiff had failed to lodge another caveat in good time until some 7 months 23 days after the expiry of the first caveat. Meanwhile, the defendant lodged a caveat to protect its interest on 30 November 1985. The defendant's caveat was therefore later than the creation of the equitable mortgage, but some 2 months and 24 days before the plaintiff lodged its fresh caveat on 26 February 1986.

The said Gojo Hartono and Anitawati Sustanto were also customers of the defendant. By a judgment of the High Court dated 29 November 1985, the said Gojo Hartono was ordered to pay the defendant two sums aggregating over US$3 million and interest. By order nisi made on 30 November 1985, the defendant obtained a charging order against the said property.

On 2 December 1985, the defendant lodged a caveat bearing No CV/21718A at the Registry of Titles claiming an interest in the property as 'chargee' by virtue of the above order nisi. On 22 January 1986, the order absolute imposing charge was granted by the High Court.

On 31 March 1986, the High Court on the application of the defendant ordered that the property be sold under its directions. On 4 April 1986, the order of sale was registered with the Registry of Titles. The plaintiff requested the defendant to withdraw its caveat but the defendant refused to do so. The plaintiff applied for reliefs.

Held, dismissing the plaintiff's application:

(1) Section 18(2)(d) of the Supreme Court of Judicature Act read with O 50 r 1 created a judicial charge over the property for securing the payment of the judgment debt.

(2) Section 114 of the Land Titles Act ('the Act') does not apply to a charging order and s 59(2) of the Act applies only to regulate charges which are capable of registration under the Act.

(3) The defendant had duly complied with the requirements of s 104(4) of the Act with regard to the description of its interest and the identification of the property and there is no merit in the plaintiff's criticisms of the caveat in question.

(4) The defendant had a charge which upon lodgment of the caveat took priority over the uncaveated interest of the plaintiff as an equitable mortgagee. The defendant's right to enforce its charge was accordingly not affected by all subsequent claims. Further, the order of court does not prejudice the plaintiff's claim, if any. Hence, there is no reason to set aside the order of court.

Cases referred to

1 *Eyre* v *McDowell* 11 ER 871 (refd)
2 *Ghana Commercial Bank* v *DT Chandiram & Anor* [1960] 3 WLR 328 (refd)
3 *Haji Abdul Rahman & Anor* v *Mahomed Hassan* [1917] AC 209 (folld)
4 *Fung Sin Wa* v *Moi Chan Hen* [1897] SSLR 175 (refd)
5 *Ng Boo Bee* v *Khaw Joo Choe* (1921) 14 SSLR 90 (refd)
6 *Chung Khiaw Bank Ltd* v *United Overseas Bank Ltd* [1970] 1 MLJ 185 (refd)
7 *Re Tan Kiong Hwa* [1972] 1 MLJ 239 (refd)
8 *Brereton* v *Edwards* (1888) 21 QBD 226 (refd)

Legislation referred to
Land Titles Act (Cap 157, 1985 Ed) ss 3(1), 40, 41, 59(2), 104(4), 109(1)(b), 114, 117
Rules of the Supreme Court 1970 O 50 r 1
Supreme Court of Judicature Act (Cap 322, 1985 Ed) s 18(2)(d)

VK Rajah for the plaintiff.
Koh Kok Wah for the defendant.

Cur Adv Vult

Lai Kew Chai J: Both parties are bankers. Each of them in effect claims that it has a prior claim over a piece of freehold property known as No 28, Coldstream Avenue, Singapore ('the property').

The relevant facts which are as simple as they are not controversial may be stated within a reasonably brief compass. In April 1980, the plaintiff granted overdraft facilities up to the limit of $1 million to both Gojo Hartono and Anitawati Sustanto upon the equitable mortgages of the property, two shop units and another landed property. Except for the property, the other properties equitably mortgaged to the plaintiff do not feature at all in these proceedings. The estimated value of the property in a mortgagee sale with vacant possession in March 1986 was said to be $593,000. The equitable mortgage of the property in favour of the plaintiff was created by the agreement of Gojo Hartono who signed a confirmation of deposit of title deeds dated 24 April 1980 whereby he agreed that the certificate of title relating to the property and issued under the Land Titles Act (Cap 157, 1985 Ed) ('the Act') in the possession of the plaintiff was to be held 'as security for the payment to (the plaintiff) on demand all moneys then owing or which should at any time thereafter be owing from A/C No 13959 of Mr Gojo Hartono and/or Mdm Anitawati Sustanto ...'. On 3 July 1980, a caveat bearing No CV/38908 was lodged by the plaintiff. Under s 109(1)(b) of the Act, this caveat lapsed and ceased to 'affect land ... at the expiration of five years from the date of lodgment of the caveat', ie the caveat lapsed on 3 July 1985 which is an important date to note as the plaintiff could have immediately on or before that date lodged a fresh caveat to protect its interest over the property. That the plaintiff had failed to lodge another caveat in good time has given rise to its present disputes with the defendant who had lodged a caveat to protect its interest, which had arisen only on 30 November 1985 and therefore later than the creation of the equitable mortgage, some two months and 24 days before the plaintiff lodged their fresh caveat on 26 February 1986. As will be seen from the following chronology of events, the plaintiff did not lodge their fresh caveat until some 7 months 23 days after the expiry of the first caveat referred to above.

The said Gojo Hartono and Anitawati Sustanto were also customers of the defendant. By a judgment of the High Court dated 29 November 1985, the said Gojo Hartono was ordered to pay the defendant two sums aggregating over US$3 million and interest. By order nisi made on 30 November 1985, it was ordered that the property or the interest of the said Gojo Hartono in the property shall 'stand charged with the payment of the sum of US$2,949,613.06 and interest of US$67,841 and interest thereon at 8% pa from the date of the judgment to the date of payment ...'.

On 2 December 1985, the defendant lodged a caveat bearing No CV/21718A at the Registry of Titles claiming an interest in the property as 'chargees of an estate in fee simple' by virtue of the above order nisi dated 30 November 1985. On 22 January 1986, the order absolute imposing charge was granted by the High Court.

On 25 February 1986, the plaintiff as equitable mortgagee lodged a caveat bearing No CV/24130A against the property.

On 31 March 1986, the High Court on the application of the defendant ordered that the property be sold under its directions. The plaintiff says that though the defendant had notice of the plaintiff's caveat, the defendant did not draw the attention of the court to the caveat. On 4 April 1986, the order of sale was registered with the Registry of Titles. Eight days later a writ of seizure and sale was issued on the application of the defendant.

The plaintiff requested the defendant to withdraw its caveat but the defendant refused to do so.

By this summons the plaintiff claims against the defendant for the following reliefs:

1(i)(a) A declaration that Caveat No 21718A lodged by the defendant on 2 December 1985 has been wrongfully lodged and/or allowed by the defendant to remain wrongfully and/or without reasonable cause in the land register in respect of the Certificate of Title (Vol 218 Folio 59) as the said caveat is improper and bad in law; and/or

(b) A declaration that the alleged interest claimed by the defendant in Caveat No 21718A as 'chargee of an estate in fee simple' by virtue of an order of court dated 30 November 1985 in Suit No 10253 of 1985 has ceased to be effective and/or has been rendered nugatory upon the making of the order absolute imposing charge on the property described in the schedule hereto; made on 22 January 1986 which ought to have been notified in the land register by means of a caveat and in the premises the said Caveat No 21718A has been allowed to remain wrongfully and/or without reasonable cause in the land register in respect of the Certificate of Title (Vol 218 Folio 59).

(ii) For consequential orders resulting from the above declarations:

(a) that Caveat No 21718A be removed forthwith by the defendant to give effect to the abovementioned declaration(s);

(b) that an inquiry be held by the Registrar of the Supreme Court to ascertain the damage and/or costs or expenses that had been sustained and/or incurred or continue to be sustained and/or incurred by the plaintiff until the date of removal of the Caveat No 21718A by the defendant; and

(c) that the defendant be ordered to pay to the plaintiff the amount so ascertained by the registrar.

(2) Further and/or alternatively: A declaration that *in the event of a sale* either by the sheriff or by a duly appointed receiver to enforce the charging order on the property described in the schedule hereto made absolute on 22 January 1986 *such a sale* shall, in accordance with the law, be subject to all the interests and rights of the plaintiff which has interests and rights in the said property, qua as a prior equitable mortgagee thereof, and which interests and rights have been duly notified by Caveat No 24130A lodged by the plaintiff on 26 February 1986.

(3) A declaration that the order of court dated 31 March 1986 obtained by the defendant for the sale of the property described in the schedule hereto under the directions of the court in Originating Summons No 240 of 1986 is defective and improperly obtained in that the defendant failed to make a full and fair disclosure to the court of all material facts known to the defendant and/or its solicitors, and/or deemed to have been known by it and/or its solicitors and in the premises the plaintiff which is affected by the said order of court is entitled ex debito justitiae to have the said order set aside.

(4) Consequential orders arising from the abovementioned declarations.

(5) Further, in the alternative, a declaration that on a sale in execution of the property described in the schedule hereto under the directions of the court pursuant to an order of court dated 31 March 1986 in Originating Summons entered No 240 of 1986, the plaintiff, which has an equitable interest in the said property by virtue of an equitable mortgage of the said property created on 24 April 1980 by the proprietor thereof by a confirmation of deposit of title deeds and which said interest is protected by Caveat No CV/24130A, is entitled to the proceeds of sale in the said property over the interest of the defendant qua as a judgment creditor.

(6) Any other relief as the court deems appropriate or necessary in the circumstances.

(7) Costs.

For the defendant, it is contended that it had obtained a charging order against the property under O 50 r 1 of the Rules of the Supreme Court 1970, which reads, so far as is material, as follows:

1(1) The power to make an order under paragraph 4 of the First Schedule to the Act (now s 18(2)(d) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed)) imposing a charge on immovable property or interest in immovable property of a judgment debtor shall be exercisable by the court in Form 102.

Form 102 reads as follows:

Order Absolute Imposing Charge on Immovable Property

(Title as in action)

Upon the application of
and upon reading the affidavit of
and
filed on the day of , 19
and the order to show cause made herein on the
day of , 19

It is ordered that the following immovable property or interest in immovable property of the defendant , namely (describe the property or interest) (or the immovable property or interest in the said property of the defendant specified in the schedule hereto) stand charged with the payment of $, the amount due from the said defendant to the plaintiff on a judgment (or order) of the High Court dated the day of , 19 (and interest thereon at the rate of $ per cent per annum from the said date until payment together with $ the costs of this application, the said costs to be added to the judgment debt.

Dated the day of , 19

(Schedule)
(Seal)
Registrar

The defendant further says that the charging order was made under the power of the court conferred by s 18 of the Supreme Court of Judicature Act, the relevant parts of which read as follows:

18(1) The High Court shall have all such powers as are vested in it by any written law for the time being in force in Singapore.

(2) Without prejudice to the generality of subsection (1) the High Court shall have and shall exercise the following powers:

...

(d) power to order land to be charged or mortgaged, as the case may be, in any case in which there is jurisdiction to order a sale;

...

(3) The powers referred to in subsection (2) shall be exercised in accordance with any written law or rules of court relating to them.

As between the plaintiff and the defendant who are claiming under unregistered interests, the question of priority is governed by s 41(1) of the Act. The whole of s 41 reads:

41(1) Except in the case of fraud, the entry of a caveat protecting an unregistered interest in land under the provisions of this Act gives that interest priority over any other unregistered interest not so protected at the time when the caveat was entered.

(2) Knowledge of the existence of an unregistered interest which has not been protected by a caveat shall not of itself be imputed as fraud.

(3) For the purposes of this section, the lodgment of an instrument for registration under the provisions of this Act has the same effect as the entry, on the date of such lodgment, of a caveat protecting the interest claimed under that instrument; but nothing in this section otherwise gives to any unregistered interest any greater effect than it may have under the instrument by which it was created.

(4) Any priority conferred by this section is lost if the caveat or other instrument in respect of which it is claimed lapses, or is withdrawn, or is otherwise disposed of.

The defendant also asserts that the charging order may be enforced by an order of court and that Part XII of the Act relating to writs of execution does not apply and that a writ of seizure and sale could no longer be issued over immovable property under the Act.

Counsel for the plaintiff submits that the defendant's reliance on s 41(1) of the Act as conferring priority to its 'rights' under the charging order is misconceived. He says that the priority conferred by the subsection is only to the extent of the rights or interest which a caveator has at the time of the lodgment of the caveat: see the proviso in s 41(3). On that basis, it is argued that the priority obtained under the caveat is only the extent of the judgment debtor's interest, namely, whatever interest which remains with the judgment debtor after he has dealt with the property. In this context I was referred to *Eyre* v *McDowell*[1] at p 881 per Lord Cranworth:

> It is hardly possible to suppose that the legislature could have intended to alter the relative position of debtor and creditor as to enable the latter to satisfy himself out of property over which the former had no disposing power. If for any reason such a change had been contemplated we should surely have had some recital indicating an intention to make such an unusual deviation from principle. But the Act contains no indication of the sort.

The plaintiff also relies on what Lord Jenkins said in the opinion of the Privy Council in *Ghana Commercial Bank* v *DT Chandiram & Anor*[2] at p 335:

> ... the following statement of the law relating to the position of a purchaser under the execution of a fi fa, which appears to their Lordships to be wholly correct: 'The law is clear that a purchaser of a property under the execution of a fi fa steps into the shoes of the judgment debtor by purchasing no more than the 'estate' of the judgment debtor therein. In other words what is sold and what is bought at a sale in execution is the right, title and interest of the judgment debtor. It follows therefore that if a certain property which is attached under execution by way of fi fa turns out to be in any way encumbered the purchaser buys subject to that charge or encumbrance.

Furthermore, counsel for the plaintiff submits that s 41 should be read with s 117 which, according to him, unequivocally states that the interest which can be sold by a judgment creditor is that interest belonging to the judgment debtor at the date of the writ. Section 117 reads:

> 117(1) The interest in registered land which may be sold in execution under a writ is the interest which belongs to the judgment debtor at the date of registration of the writ.
>
> (2) For the purpose of determining the interest in land which belongs to a judgment debtor –
>
> (a) any interest in that land purported to be created subsequently to the date of registration of the writ; and (b) any interest in that land created previously to the date of registration of the writ, and not notified in the land register nor protected by caveat at least 3 clear days before the date of the sale,
>
> is void against a purchaser of the land at the sale in execution under the writ.
>
> (3) Land shall not be sold in an execution under a writ until the expiration of 30 days from the date of registration of the writ.

In answer, counsel for the defendant refers to the common law rule that a judgment creditor in execution can take only the interest which the debtor possesses in the property and to the general equitable principle that as between competing and unregistered (equitable) claims, the maxim 'he who is first in time prevails' applies. Counsel says that both these rules are of no application in Singapore if s 41 of the Act applies. He refers to s 3(1) of the Act which reads:

> 3(1) Except as hereinafter provided, all Acts, regulations, rules, and other laws, and all practices, relating to estates and interests in land and operative at the commencement of this Act, so far as they are inconsistent with the provisions of this Act in their application to registered land, are hereby repealed.

In *Haji Abdul Rahman & Anor* v *Mahomed Hassan*[3] at p 216 it was stated:

> It seems to their Lordships that the learned judges, in these observations, have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment.

Counsel for the defendant submits that the principle of nemo dat and qui prior est tempore potior est jure are obviously inconsistent with ss 40-41 of the Act and are, pursuant to s 3 of the Act, repealed. He relied on *Fung Sin Wa* v *Moi Chan Hen*[4] which was affirmed on appeal; *Ng Boo Bee* v *Khaw Joo Choe*;[5] *Chung Khiaw Bank Ltd* v *United Overseas Bank Ltd* [6] and *Re Tan Kiong Hwa*.[7]

In my opinion, counsel for the defendant is plainly correct and I reject the plaintiff's arguments.

Counsel for the plaintiff, in another attempt to overcome the effect of the charging order obtained and caveated by the plaintiff, makes the novel submission that the defendant's caveat is bad or ineffective in law because the

charging order is not a caveatable 'interest in land' under the Act. He says s 114 indicates that a charging order would not bind or affect registered land and, further, that s 59(2) of the Act limits and prescribes the manner in which a charge of registered land may be created. He relies on New Zealand case law which states that a charging order under its relevant rules operates merely as a 'freeze' without creating an interest in land. However, counsel for the defendant relies, and in my opinion, quite rightly, on s 18(2)(d) of the Supreme Court of Judicature Act which read with O 50 r 1 created a judicial charge over the property for security the payment of the judgment debt.

As stated in Fisher & Lightwood's *Law of Mortgage*, p 4:

> A charge is the appropriation of real or personal property for the discharge of a debt ... without giving the creditor either a general or special property in, or possession of the subject of the security ... The creditor has a right of realization by judicial process in case of non-payment of the debts.

Counsel for the defendant also contends, and I again say rightly, that s 114 of the Act in terms, when read correctly, does not apply to a charging order and that s 59(2) of the Act applies only to regulate charges which are capable of registration under the Act.

I now turn to two technical points taken up by the plaintiff. First, counsel for the plaintiff says that the defendant's caveat did not accurately state the defendant's interest in the property, that the defendant is not a 'chargee' within the meaning of that expression in the Act, and that the charging order nisi had become stale upon it becoming, as it did, absolute.

Counsel for the defendant in reply relies on *Brereton* v *Edwards*[8] at p 496 per Lord Esher MR:

> The order nisi is the charging order, but it stands in abeyance until it is made absolute. When, however, it is made absolute the order nisi is the charging order, and it takes effect from the date when it was originally made.

In my judgment, the defendant had duly complied with the requirements of s 104(4) of the Act with regard to the description of its interest and the identification of the property and there is no merit in the plaintiff's criticisms of the caveat in question.

Secondly, and finally, counsel for the plaintiff says that the order of court dated 31 March 1986 should be set aside as it was improperly obtained because (1) the solicitors for the defendant did not disclose to the court that the plaintiff had made a claim as a prior equitable mortgagee; and (2) the defendant knew or ought to have known of the caveat lodged by the plaintiff on 26 February 1986. For the defendant it is pointed out that there was no non-disclosure of any relevant fact. The defendant had a charge which upon lodgment of the caveat took priority over the uncaveated interest of the plaintiff as an equitable mortgagee. The defendant's right to enforce its charge was accordingly not affected by all subsequent claims. Further, the order of court, the defendant says, does not prejudice the plaintiff's claims, if any. In my opinion, there is no reason to set aside the order of court.

For these reasons, the plaintiff's application is dismissed with costs.

Order accordingly.

Solicitors: *Rajah & Tann*; *Arthur Loke & Partners.*

Reported by *Wong Kim Fatt*